will not allow her to enforce her rights, especially if the result would be disadvantageous to the child by depriving it of the advantages of a higher mode of life and education. Her own continued immorality would of itself be a sufficient reason against handing over to her a child which was otherwise properly provided for."

It may here be pointed out that the obligation of the putative father to maintain the child arises under section 488 of the Indian Criminal Procedure Code, whose provisions are similar to those in section 3 of the local Married Women and Children (Maintenance) Ordinance, 1950 (No. 36 of 1950). I mention this because there are statements in English law books which are taken to be authority for the proposition that in English law the right of a mother to the custody of her illegitimate child arises out of her obligation to maintain her child — formerly under the Poor Laws and now under the National Assistance Act, 1948. This is correct only in so far as the rights of the mother at *common law* are concerned. But as Lord Herschell in *Barbardo v. McHugh*[5], stated (at p. 398) :—

"It is, however, no longer important to inquire what are the rights of the mother in relation to an illegitimate child at common law. All the Courts are now governed by equitable rules, and empowered to exercise equitable jurisdiction."

The fact, therefore, that under the local law the putative father may be liable to maintain an illegitimate child does not necessarily give him the right of custody.

In English law the father of an illegitimate child, so long as the child remains illegitimate, is not generally recognised for civil purposes; he is under no obligation to provide for the child, in the absence of an affiliation order, unless he had adopted it *de facto* or obtained an adoption order; unless he has obtained an adoption order he has no right to the custody of the child, even though he is in a better position to maintain it; the Court will protect his right whenever he is in lawful custody of the child. (*Halsbury's Laws of England*, 3rd Ed. Vol. 3 at pp. 108, 109). The mother of an illegitimate child has *prima facie* the right of custody and when questions on custody arise the wishes of the mother are to be taken into account but the welfare of the infant is the first and paramount consideration. The principles of law to be used in determining questions of custody are stated with great clarity by FitzGibbon L.J., in *In re O'Hara*[6], quoted with approval in *In re Carrol*[7] as follows :—

"At Common Law, the parent has an absolute right to the custody of a child of tender years, unless he or she has forfeited it by certain sorts of misconduct. Chancery, when a separate tribunal, possessed a jurisdiction different from that of Queen's Bench, and essentially parental, in the exercise of which the main consideration was the welfare of the child, and the Court did what, on consideration of all the circumstances, it was judicially satisfied that a wise parent, acting for the true interests of the child, would or ought to do, even though the natural parent desired and had the Common Law right to do otherwise, and had not been guilty of misconduct. The Judicature Act has made it the duty of every Division of the High Court to exercise the Chancery jurisdiction. In exercising the jurisdiction to control or ignore the parental right the Court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

In the present case, the child is four years old, well looked after and happy in his surroundings; he does not know his father, the applicant, as he has not lived with him even when the respondent was with the applicant; except for the period when the applicant was in India, the child was not with the applicant except for very short intervals. I think it is also important to point out that the applicant has a wife who, as a step-mother, cannot give the same affection to the child as the natural mother.

The applicant does not seem to have missed his son in the past; he has not even provided food and clothing for him. The only factor in favour of the applicant is his financial prosperity; apart, however, from the fact that the mother is entitled to the custody of her infant child in preference to the father, though from his circumstances he may be better able to educate it (*Ex parte Knee*[8]), I do not think that this is sufficient to outweigh the benefits of affection and care of his mother especially at the present tender age of the child. Adopting the principles of English law, I consider that it is for the welfare of the child that the respondent should have the custody thereof.

According to the authorities on Hindu Law it does not appear that the father of an illegitimate child has an absolute right to the custody of the child; but whatever his rights are, I think it is a sound principle that the primary consideration in cases of this nature should be the welfare of the child, and it does seem to me that English law requires modification to prevent it from operating unjustly or oppressively in this case.

The application should be dismissed with costs.

Application dismissed.

Solicitors : *S. M. Sharma; Lovelace & Hastings.*

Re NG SAY TEE; OFFICIAL ASSIGNEE, F.M. v. MANMOHAN SINGH.

[O. C. J. (Thomson J.) March 26, 1954]

[Ipoh — Bankruptcy No. 29 of 1953]

Bankruptcy — Secured creditor taking proceedings outside the bankruptcy — Bankruptcy Enactment, s. 9(ii) — Procedure.

The bankrupt had previously to his bankruptcy executed a mortgage of his share in a residuary estate to the creditor on a loan. The creditor took out proceedings against the Official Assignee for payment of the

loan and interest and in default of payment sale of the bankrupt's share in the residuary estate.

Held: a secured creditor's rights are governed by s. 9(ii) of the Bankruptcy Enactment and he is entitled to proceed outside the bankruptcy and independently of it.

Cases referred to:—

(1) *White v. Simmons* L.R. 6 Ch. App. 555, 557.

(2) *Ex parte Hirst, In re Wherly* 9 Ch. D. 278, 283.

BANKRUPTCY, Motion for Directions.

R. Govindasamy (Assistant Official Assignee) for the applicant.

Cur. Adv. Vult.

Thomson J. : — This is a motion for directions by the Official Assignee and raises a question of procedure which would appear to have caused some difficulty.

The facts which for the purposes of this motion I assume to be true are as follows. One Ng Say Tee to whom I shall refer as "the bankrupt" was and is beneficially entitled to a 1/16th share in the residuary estate of one Ewe Keok Neo, deceased. On 29th September, 1952, one Manmohan Singh, a registered moneylender to whom I shall refer as "the creditor" lent to the bankrupt the sum of $6,000. A written agreement was entered into between the parties under which the bankrupt agreed to repay the principal sum on 29th September, 1953, and to pay interest on it at the rate of 12 per cent per annum. He also agreed to execute and did execute in favour of the creditor a mortgage of his share in the residuary estate of Ewe Keok Neo by way of collateral security.

On 9th April, 1953, the bankrupt filed his petition in bankruptcy and on 13th April he was adjudicated a bankrupt and a receiving order was made in respect of his estate. In his Statement of Affairs he shewed the creditor as a secured creditor in the sum of $6,000 and estimated the value of the security at $15,000.

In the circumstances, it is hardly necessary to observe that when the debt of $6,000 to the creditor became payable on 29th September, 1953, it was not paid and on 10th October, 1953, the creditor commenced proceedings (C.S. No. 358 of 1953) against the Official Assignee "as the legal representative of the estate of Ng Say Tee, a bankrupt." The Plaint refers to the mortgage deed dated 29th September, 1952, it states that "there is now due to the plaintiff from the defendant under the said mortgage the sum of $6,000 for principal and the sum of $600 being interest" and it concludes with a prayer for payment of $6,600 and, in default of payment, sale.

The Official Assignee entered an appearance on 23rd October and on 6th November he appeared before the Assistant Registrar on a Summons for Directions when he was ordered to file his defence within 21 days.

The same day, i.e. 6th November, 1953, the Official Assignee gave Notice of Motion for directions under Rule 271 of the Bankrupty Rules as to whether the Plaint in Civil Suit No. 358 of 1953 can be treated as a motion in bankruptcy or whether such Plaint should be struck out, and the plaintiff allowed to proceed by way of Motion or Originating Summons in respect of his right of sale, if any.

When the matter came on for hearing, it was conceded by the Official Assignee that the creditor was a secured creditor, at any rate in respect of the principal sum lent by him.

Once it is conceded that the creditor is a secured creditor his rights are governed by section 9(ii) of the the Bankruptcy Enactment. Section 9(i) provides in general terms that on the making of a receiving order no creditor shall commence any proceedings in respect of his debt except with the leave of the Court. Section 9(ii), however, goes on to provide :—

"(ii) This section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed."

Section 9(ii) is substantially the same as the concluding portion of section 12 of the Bankruptcy Act, 1869, which was described by Lord Hatherley L.C., in the case of *White v. Simmons*(1) as "an express reservation of all rights." In that case His Lordship dealt with the effect of the section on an equitable mortgagee in the following terms :—

"The Plaintiff, as a mortgagee, stands outside the bankruptcy. He may come in under the bankruptcy if he chooses, and it would be wise of him to do so, especially as he asks for a sale only; but an equitable mortgagee might want other relief, as, for instance, foreclosure, which he could not have obtained in bankruptcy and he must retain his right to come here for such relief as he may want .....
On the general question, I think that I should strain the decisions which have been made if I held that, where there has in the Bankruptcy Act been an express reservation of all rights, a mortgagee should be precluded from proceeding in equity to enforce his security."

Again if the Court has any power in the present proceedings to interfere with the creditor in the exercise of his rights that power can only come from section 84 which gives the Court under its jurisdiction in bankruptcy full power to decide all questions "which may arise in any case of bankruptcy". So far as is material that section is substantially the same as section 72 of the Bankruptcy Act, 1869. That section was considered by Bacon C.J., in the case of *Ex parte Hirst, In re Wherly*(2) where it was held that an action by an equitable mortgagee to enforce his security was not

a matter which could be said to "arise in" the bankruptcy and that such creditor has a clear right to proceed by way of action in the Chancery Division. His Lordship's judgment is too long for quotation but to my mind it amply covers the present case.

I am not concerned here with the question of whether the creditor should have proceeded by way of originating summons rather than by way of suit, or with the question of whether he is entitled to the remedy for which he asks, or, indeed, to any other remedy. These are questions which, if they arise, will have to be decided in the course of the civil suit. Nor am I concerned with the question of whether in all the circumstances of the case he would not be well advised to value his security and come in under the bankruptcy. What I am concerned with is the question of whether the creditor is entitled to proceed outside the bankruptcy and independently of it and for the reasons I have stated the answer to that question is undoubtedly in the affirmative. There will accordingly be no order on the Official Assignee's motion.

Before leaving the case, I feel I should say a word about section 18 of the Second Schedule to the Bankruptcy Enactment in view of the argument that that section has in some way a bearing on the present case. It has no such bearing. In the first place, its provisions are permissive and not mandatory and, in the second place, it only applies in the case of a charge of immoveable property whereas in the present case the security is a mortgage of a *chose in action*.

No order.

KESARMAL & ANOR. v. VALLIAPPA CHETTIAR & ANOR.

[O. C. J. (Wilson J.) June 18, 1954]

[K. L. — Civil Suit No. 108 of 1954]

Res judicata — Action to set aside previous judgment on ground of fraud, forgery and perjury.

This case arises out of another Civil Suit in which the present first defendant was the plaintiff and the two plaintiffs in this Suit were the defendants. Judgment was given for the plaintiff in that action and subsequently confirmed by the Privy Council [(1954) M.L.J. 119], by which it was held that the transfer of land from the plaintiff during the Japanese occupation was obtained by duress and that the defendants were parties to it or had knowledge of it. The defendants in that action now seek to set aside that judgment on the ground that it was obtained by means of fraud, forgery and perjury.

Held: the judgment in the previous Suit is *res judicata* and could only be set aside if fraud were proved, and the allegation of fraud could only succeed if it could be shown that this matter was not before the Court in the previous Suit or could not with reasonable diligence on the part of the present plaintiffs have been before the Court.

Held also: the plaintiffs cannot succeed in that action on their allegation of perjury alone.

Cases referred to:—

(1) *Kunjabehari Chakrabarty v. Krishnadhone Majumdar* A.I.R. 1940 Cal. 489.

(2) *Everett v. Ribbands* (1946) L.T. 143.

(3) *Charles Bright & Co. Ltd. v. Sellar* (1904) 1 K.B. 6.

NOTICE OF MOTION for an order to dismiss the Suit.

K. A. Seth (*K. Chelvanayagam* with him) for the plaintiffs.

Sir Roland Braddell (*Ng Ek Teong* with him) for the 1st defendant, 2nd defendant absent.

Cur. Adv. Vult.

Wilson J. : — This is a Notice of Motion by the first defendant for an order that the suit be dismissed upon the grounds: (1) that the action is frivolous and vexatious and is an abuse of the process of the Court; and (2) the plaint filed discloses no reasonable cause of action. The original plaint was against the first defendant only. Subsequently, a Notice of Motion was filed for leave to be granted with the consent of His Highness the Sultan of Selangor in Council to join the second defendant and to amend the plaint accordingly and in certain other aspects. The second defendant is not a party to this motion. The circumstances in which this action is brought are very fully set out in the amended statement of plaint. I do not propose to refer to the allegations in detail. If this motion should have to be considered by another Court, all the allegations contained in the amended plaint will be before that Court and that Court will have a full discretion to decide all the matters which have been argued before me at considerable length and will be unfettered by the conclusions to which I have come.

Paragraphs 1 and 2 of the amended plaint are merely formal. The case arises out of another Civil Suit No. 88 of 1950 in which the present first defendant was the plaintiff and the two plaintiffs in this suit were the defendants. The second defendant in this suit was not a party to the action although he gave evidence.

Paragraphs 3 to 18 of the amended plaint set out the circumstances leading up to Civil Suit No. 88 of 1950.

Paragraphs 19 to 23 set out what happened in the Suit. The claim of the plaintiff in that suit was that the instruments of transfer executed by the plaintiff in that suit in favour of the two defendants in respect of two pieces of land in the district of Klang should be set aside on the grounds that they were obtained with the knowledge of the defendants by coercion or duress during the Japanese occupation. The learned trial